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LAY WAN YEOW & ANOR v. CHIN KOK SOON & ANOR

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
AZMAN ABDULLAH JCA
B [CIVIL APPEAL NO: N-02(NCvC)(W)-2389-12-2019]
3 FEBRUARY 2023

Abstract – *Because of the strict requirements of the law on the need for a licence to conduct a moneylending business and the burden to rebut the presumption, more often than not, unlicensed moneylenders would come up with creative solutions to avoid the laws using other legal instruments, in this case, a sale and purchase agreement. The courts must be vigilant and alert to the use of creative methods devised to overcome the strictures under the moneylending legislation.*

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CONTRACT: *Void contract – Sale and purchase agreement – Parties entered into agreement – Loan with property as collateral – Whether agreement loan agreement or for sale and purchase of property – Whether elements of moneylending present in agreement – Whether genuine transaction – Whether transaction sham and device to mask illegal moneylending transaction – Whether agreement entered into void – Contracts Act 1950, s. 24*

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MONEYLENDERS: *Moneylending transaction – Unlicensed moneylender – Parties entered into agreement – Loan with property as collateral – Whether agreement loan agreement or for sale and purchase of property – Whether elements of moneylending present in agreement – Whether genuine transaction – Whether transaction sham and device to mask illegal moneylending transaction*

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The first respondent ('first defendant') had introduced himself as a licensed moneylender to the first appellant ('first plaintiff'), who was in need of funds to settle his debts, and agreed to give a loan of RM150,000 on the condition that the property owned by the appellants ('plaintiffs') be given as a collateral for the loan. The plaintiffs then signed certain documents, which they believed to be loan documents, at the second respondent's ('second defendant') office. The total sum of the loan was RM132,354. The plaintiffs made part payment of the loan in the sum of RM13,660 to the account of Soon Fatt Enterprise. However, they later realised that the first defendant was not a licensed moneylender and that the property had been transferred through Form 14A at the purchase price of RM210,000. This prompted the plaintiffs to lodge a police report. The first defendant, however, denied giving any loan to the plaintiffs. According to the first defendant, (i) the plaintiffs had offered to sell the property at the price of RM210,000 with a

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deposit of RM150,000 during the signing of the sale and purchase agreement ('SPA'); (ii) the plaintiffs and the first defendant signed the SPA at a legal firm with the second defendant as a witness; (iii) the first defendant paid the deposit of RM150,000 and the remaining sum of RM13,951 to the plaintiffs. There was an existing charge over the property and payment of a redemption sum of RM46,048.88 was also made to CIMB Bank Bhd; and (iv) despite the full purchase price having been paid and the transfer of the property having been duly registered, the plaintiffs refused to give vacant possession to the first defendant. At the High Court, (i) the plaintiffs claimed against the defendants, arguing that the transaction was a moneylending transaction with the SPA having been prepared as a collateral for the loan; while (ii) the defendants counterclaimed for vacant possession and liquidated ascertained damages, for an injunction against the plaintiffs from entering the property and for a caveat entered by the plaintiffs to be removed. The High Court Judge ('HCJ') held that: (i) the plaintiffs failed to prove that the transaction was a loan transaction; and (ii) the SPA was a valid sale and purchase transaction and vacant possession ought to be delivered to the first defendant. The HCJ dismissed the plaintiffs' claim and allowed the defendants' counterclaim. Hence, the present appeal by the plaintiffs.

Held (allowing appeal; setting aside decision of High Court)
Per Azman Abdullah JCA delivering the judgment of the court:

(1) The HCJ erred in his analysis of the facts and, ultimately, His Lordship's decision that this was not a moneylending transaction. It was quite clear that the transaction, as per the SPA between the plaintiffs and the first defendant, was a sham and a device to mask the illegal moneylending transaction. There were contradictions in the first defendant's evidence as to the payment made to the plaintiffs which failed to corroborate his story. Even though it was said that RM150,000 was a deposit towards the purchase of the property, it was never received by the plaintiffs in full. The plaintiffs only received RM132,354 from the first defendant; the balance purchase price was never paid to the plaintiffs. The cheque, which was said to be issued by the first defendant for the amount of RM150,000, to the plaintiffs' name, was never presented or deposited to the bank. The cheque was under the company named Soon Fatt Enterprise which the first defendant denied being the registered owner of. In this regard, any genuine purchaser would ensure that the terms of payment were made correctly and any genuine purchaser's solicitor would advise the client on the correct terms of payment. (paras 42 & 43)

(2) From the conversations between the plaintiffs and the first defendant, which transpired from WhatsApp, there were elements of loan transaction where there was a breakdown of the loan and the deduction

of interests. Such conduct on the part of the first defendant was not consistent with the terms under the SPA. It was clear that this was a loan and not a genuine sale transaction. (para 45)

(3) The SPA was materially different from what is found in normal conveyancing practice. There was no caveat entered by the first defendant over the property and the first defendant never claimed for any vacant possession under the SPA, pursuant to which vacant possession should have been handed over after full payment of the balance purchase price. Interestingly, the first defendant only claimed for vacant possession after the plaintiffs filed the suit against him. (para 44)

(4) The SPA entered by the plaintiffs and the first defendant was void because it was clear that the plaintiffs had never intended to sell the property to the first defendant and it was only a collateral for the loan given by the first defendant. Since the first defendant was not a licensed moneylender under the law, any agreements entered between the plaintiffs and the first defendant shall be considered void pursuant to s. 24 of the Contracts Act 1950. The property was to be returned to the plaintiffs, pursuant to s. 417 of the National Land Code. Any transfer of the property to the first defendant shall be cancelled. No dealings with regard to the property could be done by the first defendant. (paras 49 & 52)

Obiter:

(1) Since the plaintiffs' appeal against the second defendant had been struck off, the court did not touch on her conduct in terms of her duty of care, if any, *vis-à-vis* the SPA and the moneylending transaction. The judgment was confined to the allegation of moneylending transaction, as alleged by the plaintiffs, and the question as to whether the SPA was a document which was executed for a genuine conveyancing transaction. (para 39)

Case(s) referred to:

Albert Chew v. Hong Leong Finance Bhd [2001] 4 CLJ 419 HC ***(refd)***

Dato' Dr V Thuraisingam & Anor v. Sanmarkan Ganapathy & Anor [2015] 8 CLJ 248 CA ***(refd)***

Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1 CA ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***

Lin Wen-Chih & Anor v. Mycom Bhd [2013] 1 LNS 1231 CA ***(refd)***

Mahmood Ooyub v. Li Chee Loong & Other Appeals [2020] 1 LNS 660 CA ***(refd)***

Rajeantheran Marimuthu lwn. Phoobalan Sinnan [2019] 5 LNS 10 ***(refd)***

Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, ss. 91, 92
Moneylenders Act 1951, ss. 5, 10OA
National Land Code, s. 417

For the appellants - Shalini Balan Pillai; M/s B Sha & Partners
For the respondents - Tan Chong Lii & Lee Kai Yat; M/s Yee & Lee Partners

[Editor's note: For the High Court judgment, please see Lay Wan Yeow & Satu Lagi lwn. Chin Kok Soon & Satu Lagi [2020] 1 LNS 637 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azman Abdullah JCA:

Introduction

[1] This is an appeal by the plaintiffs (appellants) against the decision of the High Court dated 12 December 2019 in respect of a dispute between the parties in relation to property held under GRN 202171, Lot 14538, Pekan Bukit Kepayang, Daerah Seremban, Negeri Sembilan ("the said property") whereby the High Court had dismissed the plaintiffs' claim and allowed the first defendant's (first respondent's) counterclaim as follows:

(i) an order that vacant possession of the said property be given to first defendant;

(ii) an order of injunction to injunct the plaintiffs from dealing with the said property after granting the vacant possession order;

(iii) liquidated ascertained damages of RM6,762 from 19 December 2017 until 15 May 2018;

(iv) liquidated ascertained damages of 8% on RM210,000 from 15 May 2018 until the delivery of vacant possession;

(v) caveat entered by the first plaintiff be cancelled;

(vi) damages of RM10,000;

(vii) interest of 5% over the judgment sum from the judgment date until the final settlement; and

(viii) cost RM10,000 to the first defendant and the second defendant respectively.

[2] The plaintiffs are aggrieved by the trial judge's decision in holding that the transaction between the plaintiffs and the first defendant is a sale and purchase transaction and not a loan transaction. Hence, this appeal by the

plaintiffs against both defendants. On 28 June 2022, this court had allowed the second defendant's (second respondent's) application in encl. 37 for security for costs. However, the plaintiffs did not make the requisite payment as ordered by this court. As such, the plaintiffs' appeal against the second defendant was struck out.

[3] We heard the appeal on 5 September 2022 and gave our decision on 12 October 2022. Having duly considered the appeal records and submissions of counsel, we unanimously decided to allow the plaintiffs' appeal. Our reasons for allowing the appeal now follow. For convenience, we shall refer to the parties by the titles assigned to them in the High Court. The appellants shall be referred to collectively as "plaintiffs". The first appellant shall be referred to as "first plaintiff", and the first respondent as "first defendant". The second respondent shall be referred to as "second defendant".

Background Facts

[4] The plaintiffs were the registered owner of the said property. The first plaintiff was in need of funds to settle his credit card debts. The first defendant had introduced himself as a licensed moneylender during a phone conversation with the first plaintiff and agreed to give a loan in the sum of RM150,000 on the condition that the said property be given as collateral for the loan.

[5] The plaintiffs then signed some documents which they believed to be loan documents at the second defendant's office. The total sum of the loan was RM132,354. The plaintiff had made part payment of the loan in the sum of RM13,660 to the account of Soon Fatt Enterprise. The plaintiffs then realised that the first defendant is not a licensed moneylender under Moneylenders Act 1951 which also in compliance with Moneylenders (Control and Licensing) Regulations 2003.

[6] On 18 January 2018, the plaintiffs realised that the said property had been transferred through Borang 14A whereby the stated purchase price was RM210,000. The plaintiffs denied that they had agreed to sell the said property, especially at a low price whereby according to the plaintiffs, the current market price of the property was RM280,000. Therefore, the plaintiffs had made a police report (Report No. Jalan Campbell/000992/18).

[7] On the other hand, the first defendant denied that he gave a loan to the plaintiffs in the sum of RM150,000. According to the first defendant, at all material times, the plaintiffs had offered to sell the said property at the price of RM210,000 with a deposit of RM150,000 during the signing of the sale and purchase agreement dated 27 July 2017 ("the SPA").

[8] Based on that, the first defendant then appointed Messrs Katherine Loh, Low & Co to prepare all related agreements in relation to the sale and purchase of the said property. The plaintiffs and the first defendant then signed the agreements at Messrs Katherine Loh, Low & Co with the second defendant as a witness.

[9] Subsequent to that, the first defendant had paid the deposit of RM150,000 and the remaining sum of RM13,951.20 to the plaintiffs. There was an existing charge over the said property and payment of a redemption sum of RM46,048.88 was also made to CIMB Bank Berhad ("CIMB").

[10] According to the first defendant, despite the full purchase price having been paid and the transfer of the said property having been duly registered on 2 January 2018, the plaintiffs refused to give vacant possession to the first defendant. Subsequently, plaintiffs denied signing the SPA and claimed that it was a moneylending transaction.

[11] The second defendant denied that the document executed by plaintiffs was a loan agreement. According to the second defendant, she was informed by her husband (who was a worker at the first defendant's office) that the first defendant intended to purchase the said property from the plaintiffs in the sum of RM210,000. Therefore, the transfer documents were executed and the payment of RM150,000 together with the remaining purchase price of RM13,951.20 were made to the plaintiffs. A redemption sum of RM46,046.88 was made to CIMB. According to the defendants this was a valid and genuine sale and purchase transaction and the second defendant has no duty of care towards the plaintiffs.

[12] The plaintiffs then filed a writ and statement of claim per Civil Suit No. NA-22NCVC-19-03-2018 in which the claim was pivoted essentially on a moneylending transaction with the SPA having been prepared as a collateral for the loan.

[13] In the defence and counterclaim, the first defendant prayed for vacant possession to be given to the first defendant, an injunction against the plaintiffs from entering the said property, liquidated ascertained damages under the SPA and the caveat entered by the plaintiffs to be removed.

Decision Of The High Court

[14] The learned High Court Judge was of the view that since the plaintiffs in their evidence stated that it was a loan transaction, therefore the burden of proof is on the plaintiffs to prove that the transaction was a loan transaction. However, the High Court found that the plaintiffs have failed to satisfy the burden of proof based on the following findings:

(i) The plaintiffs' submission is inconsistent with the statement submitted and also documentary evidence.

(ii) The plaintiffs failed to submit the WhatsApp stating that it was a loan agreement which was relied upon by the plaintiffs, and that this is a mere empty statement and was not supported by any documentary evidence.

(iii) Evidence admitted by the first defendant and SD2 together with the second defendant and SD3 show that the transaction was a sale and purchase transaction and the plaintiffs admitted that the signatures on the document were their signatures.

(iv) The document is a SPA which stated clearly that the purchase price is RM210,000 with a deposit of RM150,000.

(v) The plaintiffs admitted the signature in Borang 14A belongs to them.

(vi) The plaintiffs had duly received the purchase price of RM210,000.

(vii) The second defendant and SD3 had explained the important and general terms of the SPA.

[15] The learned High Court Judge held that ss. 91 and 92 of the Evidence Act 1950 have no application in this case and thus the plaintiffs' evidence stating that it was a loan transaction is excluded.

[16] On the issue as to whether the sale and purchase transaction through the SPA had been used as a device, sham and mask to hide an invalid loan transaction, the learned High Court Judge opined that all evidence, exhibits and documents submitted failed to show it was a loan transaction. On the contrary, the SPA has shown that it is a valid sale and purchase transaction. Therefore, since it was the finding of the High Court that this a valid sale and purchase transaction, a vacant possession should be delivered to the first defendant.

[17] Likewise, as regards the plaintiffs' plea that the second defendant failed to exercise the duty of care and due skill and competence, according to the learned High Court Judge, the burden is on the plaintiffs to prove that the second defendant has failed on her standard of care. However, the plaintiffs failed to call witnesses to give evidence on the matter and also the possible level of standard of care. There was no evidence of the standard of care in conveyancing practice.

The Appeal

[18] The grounds of appeal are as per the memorandum of appeal which reads as follows:

1. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa transaksi antara Perayu-Perayu/Plaintif-Plaintif dengan Responden Pertama/Defendan Pertama adalah suatu transaksi Pinjaman Wang yang tidak sah.

2. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan berkenaan kewujudan transaksi pinjaman wang telah dibuktikan melalui perbualan "whatsapp" (Eksibit P4) antara Perayu Kedua/Plaintif Kedua dengan Responden Pertama/Defendan Pertama pada 28.7.2017.

3. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa tidak berasas untuk pihak Responden Pertama/Defendan Pertama membayar 'earnest deposit' pada bulan Januari 2017 tetapi gagal memasukkan kaveat persendirian ke atas hartanah tersebut.

4. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Perayu-Perayu/Plaintif-Plaintif telah membayar balik wang sebanyak RM13,660.00 ke akaun Syarikat Soon Fatt Enterprise yang mana maklumat akaun tersebut diberikan oleh Responden Pertama/Defendan kepada Perayu-Perayu/Plaintif-Plaintif.

5. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa walaupun nama Responden Pertama/Defendan Pertama tidak wujud di dalam carian SSM tetapi cek (Eksibit ID3) yang diisukan oleh Responden Pertama/Defendan Pertama atas nama Perayu-Perayu/Plaintif-Plaintif menunjukkan cek tersebut adalah di bawah nama Soon Fatt Enterprise.

6. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan kredibiliti saksi-saksi Responden Pertama/Defendan Pertama apabila wujud percanggahan yang material antara keterangan Responden Pertama/Defendan Pertama (SD1) dan isteri Responden Pertama/Defendan Pertama (SD2) di mana SD1 telah menafikan kewujudan Soon Fatt Enterprise dan menafikan pengetahuan berkenaan cek yang diisukan di bawah nama Soon Fatt Enterprise serta menafikan tandatangan di dalam cek tersebut (SD3). Malah SD2 pula mengesahkan tandatangan di cek tersebut adalah kepunyaan Responden Pertama/Defendan Pertama dan turut bersetuju bahawa Responden Pertama/Defendan Pertama merupakan pemilik Soon Fatt Enterprise.

7. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Responden-Responden/Defendan-Defendan telah gagal membuktikan bahawa harga belian sebanyak RM210,000 telah dibayar dan diterima oleh Perayu-Perayu/Plaintif-Plaintif jika benar ianya adalah satu transaksi jual beli hartanah.

8. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa pembayaran deposit dan baki harga belian yang dikatakan telah dibayar oleh Responden Pertama/Defendan Pertama kepada Perayu-Perayu adalah bertentangan dan melanggari terma-terma yang tertera di dalam Perjanjian Jual Beli tersebut yang mana diakui oleh Responden Kedua/Defendan Kedua.

A 9. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Responden-Responden/Defendan-Defendan gagal membuktikan transaksi jual beli telah berlaku memandangkan wujud lompang-lompang ('loopholes') yang meragukan di dalam transaksi tersebut (khususnya berkenaan tarikh perjanjian ditandatangani) dan tiada bukti yang B ditunjukkan oleh Responden-Responden/Defendan-Defendan bahawa harga belian RM210,000.00 telah dibayar dan diterima oleh Perayu-Perayu/Plaintif-Plaintif.

10. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa C Responden Kedua/Defendan Kedua telah melanggari Seksyen 211 Kanun Tanah Negara 1965.

11. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Perjanjian Jual Beli tersebut adalah "sham" dan/atau "device" yang D digunakan oleh Responden-Responden/Defendan-Defendan terhadap Perayu-Perayu/Plaintif-Plaintif untuk menutup kewujudan transaksi pinjaman wang yang tidak sah.

12. Yang Arif Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Responden Kedua/Defendan Kedua walaupun memplidkan bahawa E beliau tidak mempunyai kewajipan berjaga-jaga terhadap Perayu-Perayu namun semasa Pemeriksaan Balas Responden Kedua/Defendan Kedua telah mengakui bahawa beliau mempunyai kewajipan berjaga-jaga terhadap Perayu-Perayu.

13. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-F undang dan/atau fakta apabila gagal mempertimbangkan dan memutuskan bahawa akibat daripada kegagalan dan/atau kecuaian Responden Kedua/Defendan Kedua ia telah menyebabkan Perayu-Perayu/Plaintif-Plaintif telah kehilangan hartanah milik Perayu-Perayu/Plaintif-Plaintif.

G 14. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa Responden Kedua/Defendan Kedua gagal melaksanakan tanggungjawabnya sebagai "stakeholder".

15. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan/atau fakta apabila memutuskan bahawa Responden H Pertama/Defendan Pertama berjaya membuktikan tuntutan balas dan membenarkan tuntutan balas tersebut.

Submissions

[19] Before the High Court, the agreed issues for determination are as I follows:

(i) Whether the transaction between the plaintiffs and the first defendant is a loan transaction and not a sale and purchase transaction?

(ii) Whether the sale and purchase transaction through the SPA had been used as a device, sham and mask to hide the illegal loan transaction between the plaintiffs and the first defendant?

(iii) Whether the first defendant has the right to claim the prayers stated in his counterclaim?

[20] On the first issue of whether the transaction between the plaintiffs and the first defendant is a loan transaction and not a sale and purchase transaction, the plaintiffs submitted that there is material contradiction in the agreement signed whereby:

(i) there is a dispute as to the date of the agreement signed. There is no evidence that the plaintiffs had signed the SPA which is dated 27 July 2017;

(ii) the unusual earnest deposit payment and deposit which was exceeding 10% which was admitted by the second defendant. Besides, the fact that the buyer is a cash buyer, the settlement period is unusually long as compared to the typical sale and purchase agreement situation; and

(iii) there is a dispute regarding the payment of the total purchase price of RM210,000.

[21] The plaintiffs submitted that the first defendant had extended the settlement period of the agreement for six months to give time to the plaintiffs to make repayment of loan. Upon the failure of plaintiffs to make repayment within the time, the first defendant had executed the agreement and made the redemption payment to CIMB on 19 December 2017. Counsel for the plaintiffs then referred to the case of *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1 which stated as follows:

> (3) The dissonance between the terms of the SPAs and the conduct of the parties was disturbing. The fact that basic terms were flouted or not followed would point to the parties having a comfort level that could only be achieved because of a separate agreement. The whole unconvincing episode led thus to three sums stated as deposit: RM120,000 in the statement of claim, RM1,4m in the first SPA and RM780,000 in the second SPA. The deposit to the plaintiff did not really matter for it already had the defendant in its full grip. It was more likely than not that the second SPA was not given to the defendant and the plaintiff must have thought that it was better to exhibit the second SPA for the loan was approved based on the second SPA and furthermore it would not have to explain why there was a stated RM1.6m paid under the first SPA. Alas, but for the vigilance of the defendant's solicitors, this discrepancy might not have been discovered for both were dated and stamped the same date. Courts would not lend its aid to enforce pretended obligations. Having started off as a sham agreement, good for the optics, the plaintiff could not have transformed it into a real one and go for the jugular. It became an instrument to oppress and exploit which the law would intervene to protect the more vulnerable victim. This court was convinced,

A on the balance of probabilities, that the SPAs were a sham, standing up like a sore thumb, when its terms were brushed aside with no compunction of what tomorrow may bring simply because undergirding it was the real transaction of illegal money/ending business where the plaintiff was more than secured, both in the sense of collateral and legal position, to act leisurely and 'legally' as it may be pleased. The SPAs were
B unenforceable especially when the remedy of specific performance prayed for was an equitable remedy. ...

[98] We are more than satisfied that the dissonance between the terms of the SPA, the conduct of the parties and the overall circumstances of the case, more than support on the balance of probabilities the
C defendant's contention that the SPA and the related documents are a cloak to conceal the real substance of an illegal money/ending transaction charging exorbitant interest of RM400,000.00.

[22] However, the defendants submitted otherwise. It was submitted that the documentary evidence tendered and testimony of all the witnesses
D (SD1, SD2, SD3 and SD4) given during the trial, corroborated and supported the position that the transaction made between the plaintiffs and first defendant is a genuine SPA which had been witnessed by the second defendant. Besides, the plaintiffs testified that they had voluntarily put down their signatures on the SPA without being forced by anyone.

E **[23]** It is the submission of the defendants that the plaintiffs are bound by the agreement regardless of the fact that they are ignorant of the language it is written in. The law on *non-est factum* is trite whereby any person who signs the documents ought to be held bound by them and are responsible for the legal consequences of the document which had been signed. In this regard,
F the defendants referred to the case of *Lin Wen-Chih & Anor v. Mycom Bhd* [2013] 1 LNS 1231; [2014] 3 MLJ 691 whereby the Court of Appeal stated as follows:

[21] The principle, a person is bound by his contract regardless that he is ignorant of the language it is written in, is well established. The case of
G *Subramaniam v. Retnam* [1966] 1 MLJ 172; [1965] 1 LNS 169 referred to *Ismail bin Savoosah & Ors v. Hajee Ismail* [1889] 4 Ky 453 at p 458 where Wood AG CJ said:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance
H of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained

I **[24]** It was submitted on behalf of the first defendant that the plaintiffs' allegation of moneylending is bare assertion and an afterthought.

[25] On the second issue which is whether the SPA had been used as a device, sham and mask to hide the illegal loan transaction between the plaintiffs and the first defendant, the plaintiffs submitted that based on the communication between the plaintiffs and the defendant through WhatsApp (as in exh. P1), the whole transaction between them was of moneylending. It was clear from the conversation that there is an agreement for a loan details of which are as follows:

Loan - 150,000.00

(-)

8% interest	12,000.00
Caveat fees	600.00
Lawyer fees	1,000.00
Old loan interest	3,646.00
Late payment charges	400.00
Total	17,646.00

Loan - 150,000.00 - 17,646.00 = 132,354.00.

[26] In fact, according to the plaintiffs, based on that conversation, the first defendant had deposited RM132,354 on 28 July 2017 to the plaintiffs whereby RM74,354 was made *via* online payment and the remaining RM58,000 was made in cash.

[27] Besides, it was submitted that the plaintiffs had made the repayment of loan for the amount of RM13,660 to Soon Fatt Enterprise's account. In this regard it was highlighted that the plaintiffs were able to prove during the cross-examination of SD2 (the first defendant's wife) that Soon Fatt Enterprise is related to the first defendant.

[28] Therefore, the plaintiffs submitted that the SPA had been used as a device, sham and mask to hide the illegal loan transaction and the learned High Court Judge erred in his finding that the agreement is a sale and purchase agreement. The plaintiffs referred to the case of *Rajeantheran Marimuthu lwn. Phoobalan Sinnan* [2019] 5 LNS 10 which held as follows:

> [38] Lastly, the plaintiffs had also contended that the impugned SPA was a sham agreement. In *Kuppusamy Berapans v. Anggamah Ramasamy & Anor* [1991] 3 CLJ (Rep) 97, at p. 110, it was stated as follows:
>
> > Sham has been explained as "a false label in which the express purpose does not correspond with the true purpose." The clearest statement of the principle is that provided by Diplock LJ in *Snook v. London And West Riding Investment Ltd* [1967] 2 QB 786 at 802:
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> > > Acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and

A obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v. Maclure and Stoneleigh Finance Ltd v. Phillips*), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the B acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

The Court in order to determine whether a document or C transaction is a sham ought to have regard to all the circumstances – both before and at the time of the execution of the document or creation of the transaction.

[29] On the other hand, the first defendant submitted that the learned High Court Judge has considered the evidence as contended by the plaintiffs that D a WhatsApp conversation is proof of a moneylending transaction. The learned High Court had decided in para. 16 as follows:

16. Plaintif pertama dan plaintif kedua bersandarkan kepada ekshibit P1 yang merupakan pesanan whatsapp dari defendan pertama sebagai dokumen pinjaman wang. Ekshibit P1 sama sekali tidak dapat E membuktikan suatu transaksi pinjaman wang antara plaintif pertama, plaintif kedua dan defendan pertama. Ini kerana ekshibit P1 secara sendirinya tidak dapat menunjukkan ia adalah suatu pinjaman wang daripada defendan pertama kepada plaintif pertama dan plaintif kedua. P1 hanyalah suatu pesanan whatsapp dari defendan pertama mengenai pinjaman RM150,000.00. Plaintif pertama dan plaintif kedua dalam F keterangan mereka menyatakan mereka telah menandatangani dokumen-dokumen yang dipercayai perjanjian pinjaman wang yang berjumlah RM150,000.00. Tetapi dokumen-dokumen tersebut tidak dikemukakan untuk menunjukkan bahawa ia adalah mengenai pinjaman wang berjumlah RM150,000.00. Ini adalah pengataan kosong plaintif pertama dan plaintif kedua, yang tidak disokong dengan apa-apa keterangan G dokumentar.

[30] Further, in opposing the plaintiffs' allegations that repayment of loan had been made to the first defendant, it was submitted by the first defendant that according to all the results retrieved from the SSM website, it is clear that the first defendant is not the registered owner of any company or entity H named Soon Fatt Enterprise. Even if Soon Fatt Enterprise does exist, the signature of the first defendant on the Hong Leong Bank Berhad cheque belonging to Soon Fatt Enterprise does not prove that it is a moneylending company.

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[31] It is therefore, the submission of the second defendant that the plaintiffs have not duly discharged their burden of proof on the balance of probabilities that there was a moneylending agreement entered between them and the first defendant and further the plaintiffs have failed to prove that Soon Fatt Enterprise was a moneylending company.

[32] Besides, there is no evidence was led by the plaintiffs how the sale and purchase agreement entered was a device, sham and masked as a moneylending transaction. Therefore, the learned trial judge is correct in concluding that the plaintiffs and first defendant have entered into one valid sale and purchase agreement on the principal of willing buyer and willing seller.

[33] For the third issue on whether the first defendant has the right to claim the prayers stated in his counterclaim, the plaintiffs submitted that the SPA was used as a device, sham and mask to hide the illegal loan transaction. Therefore, the first defendant is not entitled to make such claims against the plaintiffs. Besides, the first defendant had not proved his claims.

[34] However, for the defendants, they submit that since the transaction was proven to be a valid, subsisting and legitimate SPA, the learned trial judge is thus correct in finding that the counterclaim by the first defendant is correct. Since vacant possession has not been handled over, the first defendant has a claim under cl. 7.2 of the SPA.

[35] According to the plaintiffs, they were neither informed nor the terms and conditions of the agreements were translated by the second defendant. Besides, according to the plaintiffs, the second defendant admitted that Form 14A was signed by the plaintiffs on the date the agreement was signed and not on 7 November 2017 as stated in the Form 14A. Therefore, plaintiffs submitted that the second defendant was negligent in executing her duty. Plaintiffs had referred to the case of *Albert Chew v. Hong Leong Finance Bhd* [2001] 4 CLJ 419 which stated as follows:

> The plaintiff admitted in his evidence that the signature which he said was signed in his presence and/or before him, was indeed never signed in his presence. In other words, the advocate and solicitor had falsified the attestation. He had breached a code so fundamental to the legal profession that the excuse he gave that it was a practice of the legal firm to do so as he did, makes the commission even more heinous.
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> Perhaps this case ought to give all legal assistants the justification to have the courage of their conviction to tell their respective employers that they will not be a party to any illegal or improper conduct. If the legal assistant knowingly and willingly condones an illegal act of the firm without acting against such misconduct then he shall be a party to it and cannot in my view plead either ignorance, or duty, as a mode of exculpation. Legal assistants must have the moral fibre to stand up to the machinations of ignoble employers.

[36] Plaintiffs also referred to the case of *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1 which held as follows:

> [33] We might as well add here that in a lot of sham transactions camouflaging the illegal money/ending transaction, a common feature seems to be that the solicitors for the lender/"purchaser" would also act for the borrower/"vendor" but that instructions would be given by and taken from the lender/"purchaser".
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> ...
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> [94] In a genuine sale and purchase transaction, the solicitors concerned acting for the purchaser and here, in the explanation of the self-same solicitors, assisting the vendor as well to complete the transaction, would want to comply with what he himself had drafted at cl. 7 of the SPA with respect to filing the prescribed form in CKHT 1A for the vendor and CKHT 2A and CKHT 502 for the purchaser pursuant to the Real Property Gains Tax 1976 within 60 days from the date of the SPA.
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> [95] There is no evidence that this has been complied with and this negates further the genuineness of the transaction and conversely supports the defendant's stand that the sale and purchase of the property was not meant to be transacted from the very beginning based on the assurance given by Dato' Adly that it was there only as a collateral.

[37] However, the second defendant opposed to the plaintiffs' allegation and submitted that there is no duty of care owed and/or breach of duty of care by the second defendant because the plaintiffs were not the clients of the second defendants and the plaintiffs failed to plead and prove a breach of standard of care. It is trite that in professional negligence cases, the burden lies on the plaintiffs to establish that the standard of care has been breached before the onus shifts to the second defendant to call in witness to rebut the same. (See *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486 and *Dato' Dr V Thuraisingam & Anor v. Sanmarkan Ganapathy & An*or [2015] 8 CLJ 248; [2016] 3 MLJ 227).

[38] The second defendant further submitted that the transaction between the plaintiffs and the first defendant was a legitimate sale and purchase transaction and the plaintiffs' purported moneylending argument was an afterthought and without basis because:

(i) the plaintiffs were aware of the sale and purchase documents and are bound by what they have signed voluntarily;

(ii) the plaintiffs could have sought for legal advice but had chosen not to do so; and

(iii) there was no evidence of moneylending arrangement.

Our Decision

[39] Since the plaintiffs' appeal against the second defendant has been struck off, we will not touch on her conduct in terms of her duty of care (if any) *vis-à-vis* the SPA and the impugned moneylending transaction. Our judgment is therefore confined to the allegation of moneylending transaction (as alleged by the plaintiffs) and the question as to whether the SPA is a document which was executed for a genuine conveyancing transaction.

[40] The first defendant's counsel submitted that the plaintiffs had voluntarily executed the agreement and all other relevant documents, including Form 14A and therefore the plaintiffs had executed the SPA on their own free will. Therefore, according to the first defendant, in the absence of fraud or misrepresentation, in law, the plaintiffs were bound by the terms and conditions of the SPA.

[41] However, both sides of the narratives are poles apart and it is now the duty of this court to consider the matter. In the case of *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186; [1984] 1 MLJ 243, the Federal Court had ruled that the surrounding circumstances and factual background have always been admissible whereby it was stated as follows:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hope to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

[42] Flowing from the above legal propositions, we had examined all the facts of this case and are of the considered opinion that the learned High Court Judge had erred in his analysis of the facts and ultimately, his decision that this was not a moneylending transaction. Looking at all the facts and circumstances, it is quite clear that the transaction as per the SPA between the plaintiffs and the first defendant was a sham and a device to mask the illegal moneylending transaction. We find contradictions in the first defendant's evidence as to the payment made to the plaintiff which in our view failed to corroborate his story.

[43] In our view, even though it was said that RM150,000 was a deposit towards the purchase of the said property, it was never received by the plaintiffs in full. The plaintiffs only received RM132,354 from the first defendant. The balance purchase price was never paid to the plaintiffs. The cheque which is said to be issued by the first defendant for the amount of RM150,000 dated 25 July 2017 to the plaintiffs' name was never presented

A or deposited to the bank. The cheque was under the company name Soon Fat Enterprise which the first defendant denied that he is the registered owner to company. In this regard, any genuine purchaser would ensure that the terms of payment are made correctly and any genuine purchaser's solicitor would advise the client on the correct terms of payment.

B **[44]** It is our observation also that the SPA is also materially different from what we would find in a normal conveyancing practice. There was no caveat entered by the first defendant over the said property and the first defendant never claimed for any vacant possession pursuant to cl. 7.2 and s. 9 of the First Schedule of the SPA pursuant to which vacant possession should have C been handed over after full payment of the balance purchase price. Interestingly, the first defendant only claimed for vacant possession in March 2018 after the plaintiffs filed suit against the first defendant.

[45] We disagree with the learned High Court Judge who held that exh. P1 failed to show that there is an element of moneylending. From the D conversation between the plaintiffs and the first defendant which transpired from the WhatsApp, it showed the elements of loan transaction whereby there is the breakdown of the loan and the deduction of interest. Such conduct on the first defendant's part is to our mind, not consistent with the terms under the SPA. It is quite clear from the WhatsApp that this was a loan E and not a genuine sale transaction. The failure on the part of the learned High Court Judge to consider, and to give due weight to this part of the evidence that was presented at the trial amounted to a misdirection, which warranted appellate intervention.

[46] In this regard, the law on moneylending is very clear. We are F conscious that s. 5 of the Moneylenders Act 1951 states that no person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under the Act. The requirement of license was further enhanced through Moneylenders (Amendment) Act 2003.

G **[47]** We also conscious on the presumption of a person carrying on the business of moneylending which the principle was introduced under the amendment effected by the Moneylenders (Amendment) Act 2011 which according to the explanatory statement to the bill, seeks to facilitate the proof of business of moneylending. Under s. 10OA, it stated as follows:

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> 10OA Presumption as to the business of moneylending
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> Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.

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[48] Because of these strict requirement of the law on the need for a licence to conduct moneylending business and the burden to rebut the presumption, the unlicensed moneylenders sometimes come up with creative solutions to avoid the laws using other legal instruments such as the SPA. The courts must be vigilant and be alert to the use of creative contractual devices to overcome the strictures under the moneylending legislation.

[49] Therefore, we are of the view that the agreement (SPA) entered by the plaintiffs and the first defendant is void because it is quite clear that the plaintiffs had never intended to sell the said property to the first defendant and it was only a collateral for the loan given by the first defendant. Since the first defendant is not a licensed moneylender under the law, any agreements entered between the plaintiffs and the first defendant shall be considered void pursuant to s. 24 of the Contracts Act 1950.

[50] In arriving at our decision, we followed the decision of the Court of Appeal in the case of *Mahmood Ooyub v. Li Chee Loong & Other Appeals* [2020] 1 LNS 660; [2020] 6 MLJ 755 which held as follows:

> (4) The moment a court of law made a finding that the transaction was moneylending and the fact that the lender was not licensed to lend with interest that made the whole agreement no matter how it was structured, into an illegal money/ending agreement which was unenforceable under s. 15 of the Moneylenders Act 1951. In this instance, the device of a sale and purchase agreement and a memorandum of transfer duly signed as security for a loan with interest charged was clearly to circumvent the provisions of the Moneylenders Act 1951 designed to protect the borrower from being exploited. Hence, the transactions in this case were illegal as it was clearly forbidden under the Moneylenders Act 1951, against public policy and caught by s. 24(a), (b), (c) and (e) of the Contracts Act 1950. (paras 234-237).

Conclusion

[51] In reaching our conclusion, we were mindful of the fact that learned High Court Judge had the audio/visual advantage which this court is deprived of. We are however satisfied that there was a fundamental lapse in the judicial evaluative process which vitiated the judge's decision that this a genuine SPA. The WhatsApp message (exh. P1) was most telling. It clearly and unmistakably shows that the underlying transaction is a "loan". Therefore, the judge's decision that the plaintiffs had failed to prove that this was a moneylending transaction, was in the circumstances, plainly wrong.

[52] Based on the aforesaid reasons, we therefore set aside the decision of the learned High Court Judge. We have considered the other reliefs sought by the plaintiffs in their statement of claim and we make the orders as follows:

A (i) All the transactions between the plaintiffs and the first defendant is void.

(ii) The said property is to be returned to the plaintiffs pursuant to s. 417 of National Land Code. Any transfer of the said property to the first defendant shall be cancelled. No dealings with regard to the said property can be done by the first defendant.

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(iii) No order as to cost.

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